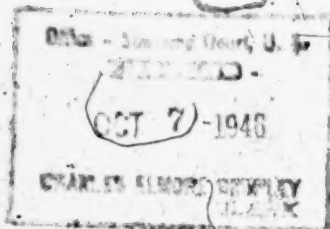


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No. 583

In the Supreme Court of the United States

OCTOBER TERM, 1946

**PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION, PETITIONER**

v.

**MOHAWK WRECKING AND LUMBER COMPANY, a
PARTNERSHIP, AND HARRY SMITH**

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH
CIRCUIT**

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

Paul A. Porter, Administrator of the Office of Price Administration, petitioner herein, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit in the above entitled case, entered on August 12, 1946, affirming an order of the District Court denying an application under Section 202 (e) of the Emergency Price Control Act for an order compelling compliance with an administrative subpoena.

OPINIONS BELOW

The opinions of the District Court (R. 18) and Circuit Court (R. 26) have not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 12, 1946 (R. 26). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Whether the Emergency Price Control Act of 1942 authorizes the delegation by the Price Administrator, to District Directors, of the authority to sign and issue subpoenas for purpose of the investigative functions authorized by Section 202 of the Act.

STATUTE AND REGULATION INVOLVED

The statute and regulation involved are the Emergency Price Control Act of 1942 (56 Stat. 23), as amended by the Stabilization Extension Act of 1944 (58 Stat. 632), 50 U. S. C. App. Sec. 901 et seq., and Revised General Order 53 (9 F. R. 5191). The pertinent provisions are set forth in the Appendix, *infra*, pp. 9-13.

STATEMENT

In the course of an investigation being conducted by the Office of Price Administration into alleged violations by the respondent company of Maximum Price Regulation 215 (8 F. R. 14145), Maximum Price Regulation 26 (8 F. R. 7570) and the General Maximum Price Regulation (7 F. R. 3153) a subpoena *duces tecum* was issued to

respondent company and the two co-partners, Harry Smith and Harry Jaffa (R. 5). The subpoena was served on Harry Smith on January 9, 1946 (R. 5). On January 11, Harry Smith appeared in response to the subpoena, filed a claim of exemption under the Compulsory Testimony Act (R. 10-11) and at his request an adjournment was granted to January 25, 1946 (R. 4). A further adjournment was later requested to February 4, 1946, which was also granted (R. 4). No appearance was made by the respondents on that date (R. 4). On February 1, 1946, counsel for the respondents wrote a letter to the Detroit office of the Office of Price Administration stating that service should have been made upon Harry Jaffa, who was then in the State of Washington, and stating that there were "grave doubts about your authority as District Director to issue a subpoena in view of the fact that the Act of Congress in question directs that the Administrator may by subpoena require any person engaged in the business of dealing with any commodity, to appear and testify, or to appear and produce documents, or both" (R. 12-15).

On March 18, 1946, the Administrator, through his District Enforcement Attorney, applied for an order in the District Court under Section 202 (e) of the Act requiring the respondents to appear at the Detroit office of the Office of Price Administration and to produce all records.

required to be produced by the previously issued subpoena, or in the alternative, to make such records fully available for inspection by a duly authorized representative of the Office of Price Administration at the respondents' place of business (R. 3-4).

The application was denied and dismissed by the District Court on April 16, 1946, on the ground that there was no authority under the Price Control Act for the Administrator's delegation to the District Director of the authority to sign and issue subpoenas (R. 18-23). The Circuit Court of Appeals affirmed (R. 26-34).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Sixth Circuit erred in affirming the District Court order denying the Administrator's application under Section 202 (e) of the Emergency Price Control Act to enforce an administrative subpoena on the ground that the Act did not authorize the Administrator to delegate the function of signing and issuing such subpoenas.

REASONS FOR GRANTING THE WRIT

1. As the court below admitted (R. 34), its decision conflicts with the decisions of four other Circuit Courts of Appeal. See *Pinkus and Segal v. Porter*, 155 F. 2d 90 (C. C. A. 7); *Porter v. Gantner and Mattern Company*, decided June 24, 1946 (C. C. A. 9); *Porter v. Murray*, decided

June 28, 1946 (C. C. A. 1); *Raley v. Porter*, decided June 17, 1946 (App. D. C.). Petitions for certiorari were filed in the *Raley* case on September 16, 1946 (*Raley v. Porter*, No. 512), and in the *Murray* case on September 9, 1946 (*Murray v. Porter*, No. 483).

These four decisions are supported by the language of Section 201, quoted below,¹ which was described in the Senate Committee Report as authorizing the Administrator to "perform his duties through such employees or agencies" as he was permitted to hire "by delegating to them *any of the powers* given to him by the bill." (S. Rep. 931, 77th Cong., 2d Sess., pp. 20-21). [Italics supplied.] The report further stated

¹ Section 201 (a) * * * The Administrator may, subject to the civil-service laws, appoint such *employees* as he deems necessary in order to carry out his functions and duties under this Act, and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may utilize the services of Federal, State, and local agencies and may utilize and establish such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed.

(b) The principal office of the Administrator shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place. * * *

(d) The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act. [Italics supplied.]

that the Act authorized "the Administrator, or any representative or other agency to whom he may delegate *any or all* of his powers, to exercise such powers in any place." (*Ibid.*)

2. The court below nevertheless thought that *Cudahy Packing Co. v. Holland*, 315 U. S. 357, compelled it to reach a different conclusion from that of the other four circuits, although they had all specifically dealt with the *Cudahy* decision and concluded that it was not controlling. The opinion in the *Cudahy* case relied largely on specific manifestations in the history of the Fair Labor Standards Act of an intention not to delegate the subpoena power (see pp. 364, 366), such as incorporation by reference of the subpoena provisions of the Federal Trade Commission Act and the specific elimination from an earlier draft of the bill of authority to delegate the subpoena power. There is nothing comparable in the history of the Emergency Price Control Act, and the Committee Report, quoted *supra*, shows definitely that Congress intended to allow delegation of "any or all" of the Administrator's powers. That the *Cudahy* case did not mean to exclude the possibility of delegation of the subpoena power being authorized under general language such as is contained in Section 201 appears from one of the statutes cited as illustrative of what would be sufficient. See p. 365 n. 9 (Railroad Unemployment Insurance Act, 45 U. S. C. § 362 (a) (m)).

3. The decision of the court below works a substantial interference with the expeditious and orderly discharge of the investigative functions of the Office of Price Administration. The only alternatives to the delegation involved in the suit are (1) that the Administrator himself personally consider whether a subpoena should be issued in connection with the multitude of investigations carried on in all parts of the country—and it is significant that during 1945, approximately 750 investigations were completed per working day; or (2) that the Administrator sign the subpoenas in blank, and send quantities of such signed, blank subpoenas out to the various field offices for issuance by the local officials. The first alternative would impose an administratively impossible burden. The second alternative is also undesirable, for as was observed in *Raley v. Porter*, *supra*: “It is more prudent and orderly for subpoenas to be signed by the selected representatives who must exercise the discretion which their use involves. The difference between the one system and the other is like that between signing hundreds of blank checks for future use and authorizing selected representatives to sign checks from time to time. Congress did not forbid the more orderly practice which the Administrator adopted.”

Seventeenth Quarterly Report of the Office of Price Administration (1946) p. 104.

CONCLUSION

The decision of the court below conflicts with the decision of four other circuits, and is based on a misconstruction of a prior decision of this Court. The question is one of importance to the administration and enforcement of the Emergency Price Control Act. For these reasons a writ of certiorari should be granted.


Respectfully submitted.

J. HOWARD MOGRATH,
Solicitor General.

GEORGE MONCHARSH:

*Deputy Administrator for Enforcement,
Office of Price Administration.*

OCTOBER 1946.



APPENDIX

1. Pertinent provisions of the Emergency Price Control Act of 1942 (56 Stat. 23) as amended by the Stabilization Extension Act of 1944 (58 Stat. 632), 50 U. S. C. App., Supp. V, 901 et seq. are as follows:

TITLE II—ADMINISTRATION AND ENFORCEMENT

ADMINISTRATION

SEC. 201. (a) There is hereby created an Office of Price Administration, which shall be under the direction of a Price Administrator (referred to in this Act as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of \$12,000 per annum. The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary in order to carry out his functions and duties under this Act, and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may utilize the services of Federal, State, and local agencies and may utilize and establish such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any case in any court. In the appointment, selection, classification, and promotion of

officers and employees of the Office of Price Administration, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(b) The principal office of the Administrator shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place. * * *

(d) The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act.

INVESTIGATIONS; RECORDS; REPORTS

SEC. 202. (a) The Administrator is authorized to make such studies and investigations, to conduct such hearings,¹ and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.

(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and

¹ The preceding four words added by Section 105(a) of the Stabilization Extension Act of 1944.

to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpoena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpoena require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

(d) The production of a person's documents at any place other than his place of business shall not be required under this section in any case in which, prior to the return date specified in the subpoena issued with respect thereto, such person either has furnished the Administrator with a copy of such documents (certified by such person under oath to be a true and correct copy), or has entered into a stipulation with the Administrator as to the information contained in such documents.

(e) In case of contumacy by, or refusal to obey a subpoena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by

such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4 (a).

(f) Witnesses subpoenaed under this section shall be paid the same fees and mileage as are paid witnesses in the district courts of the United States.

(g) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege.

(h) The Administrator shall not publish or disclose any information obtained under this Act that such Administrator deems confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless he determines that the withholding thereof is contrary to the interest of the national defense and security.

(i) Any person subpoenaed under this section shall have the right to make a record of his testimony and to be represented by counsel.²

2. The provisions of Revised General Order 53 (9 F. R. 5191, May 13, 1944) are as follows:

General Order 53 is amended and revised to read as follows:

Pursuant to the authority conferred upon the Administrator by the Emergency

² Subsection (i) added by Sec. 105 (b) of Stabilization Extension Act of 1944.

Price Control Act of 1942 as amended, the following order is prescribed:

(a) *Order delegating authority to sign and issue subpoenas and inspection requirements in rent and price investigations.*—

In connection with any investigation related to the administration or enforcement of the Emergency Price Control Act of 1942 as amended, or any regulation or order issued thereunder, the several Regional Administrators and the several District Directors of the Office of Price Administration are each authorized within their respective regions, or districts to sign and issue: (1) subpoenas requiring any persons to appear and testify or to appear and produce documents, or both, at any designated place; (2) inspection requirements requiring any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodation, to permit the inspection and copying of records and any other documents and to permit the inspection of inventories or defense-rental area housing accommodations, or both.

(b) The terms used herein shall have the same meaning as in the Emergency Price Control Act.

Issued and effective this 13th day of May 1944.